Neely's Car Clinic *and* International Association of Machinists and Aerospace Workers, District 190, Local Lodge No. 1492. Case 20–CA–13973

May 11, 1981

SUPPLEMENTAL DECISION AND ORDER

On December 18, 1980, Administrative Law Judge Jay R. Pollack issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a brief in support of cross-exceptions and in opposition to Respondent's exceptions.

The Board has considered the record and the Administrative Law Judge's Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found that backpay claimant Richard Jones was entitled to backpay from September 9, 1978, when he commenced his interim employment, to June 4, 1979, when Respondent offered him reinstatement,[1] but tolled Jones' backpay from July 17, 1978, the date of his discharge until September 9, 1978, on the ground that he did not diligently seek employment during this period. The General Counsel excepts to his finding and we find merit to his exceptions.

Jones testified that after his discharge he sought mechanical work at various car dealerships, service stations, and retail stores within a 30-mile radius of his Fairfield, California, residence. He identified 10 such employers by name and identified others by their location or by their product or business. He filed an application at the Grand Auto Store located in Fairfield, but could not testify with certainty as to other applications filed. On the day he was discharged Jones contacted his union and asked that his name be placed on the out-of-work list. He visited the union hall at least twice a week to ascertain if there were any job referrals. Jones contacted the state unemployment office but was told that the Union would be a better source of work for a mechanic. He also checked the weekly want-ads in the Fairfield and Vallejo newspapers and followed up on those vacancies for which he was qualified by calling or visiting the employer. Jones obtained work as a musician in September 1978, and was so employed until he received a valid reinstatement offer from Respondent.

The Administrative Law Judge characterized Jones' testimony as evasive, based on his inability to recollect certain details of his search for employment, including the dates he contacted employers. Except to the extent the Administrative Law Judge based his characterization on the observation of Jones' courtroom demeanor, we are of the opinion that it is unwarranted. The hearing in this case was convened over 2 years after Jones' discharge, and Jones apparently kept no detailed notes of his job search. Thus, his inability to recollect the specifics of each and every job contact is understandable. Moreover, a close reading of his testimony shows it to be clear and without internal contradiction. Relying in part on what he perceived as vagueness in Jones' testimony, the Administrative Law Judge found that Jones did not establish that he made diligent efforts to obtain employment. But by requiring Jones to establish the sufficiency of his search for work the Administrative Law Judge misapplied the burden of proof appropriate to backpay cases. The General Counsel must show only the gross amount of backpay due and owing to the discriminatee. Thereafter it falls to Respondent to show that gross backpay has been diminished by a willful loss of earnings.[2] On this record, we find that Respondent has not met its burden.

Notwithstanding his limited burden, the General Counsel presented Jones' testimony as to his efforts to find employment. Respondent attempted to disprove Jones' testimony through the testimony of service managers employed by three employers Jones said he contacted: Frank Nelson Motors; Wilson-Cornelius Ford Agency; and Avery Greene Motors. None of them remembered Jones, but the service manager of Avery Greene Motors was not employed there when Jones was looking for work. Contrary to the Administrative Law Judge, we see no inconsistency between their testimony and that of Jones such as to undermine Jones' claim that he sought employment with these employers. Jones testified that he spoke with either a service manager or a mechanic at each of these employers. He was told at all three dealerships that there were no job vacancies. Accordingly, he did not file an application at Frank Nelson Motors or Avery Greene Motors and did not recall filing an application at Wilson-Cornelius Ford Agency. Neither Avery Greene Motors nor Wilson-Cornelius Ford Agency asked persons inquiring about employment to file

[1] Respondent excepted to the Administrative Law Judge's failure to find that its backpay liability was tolled by its October 4, 1978, offer of reinstatement or by various representations made by the Regional Compliance Officer concerning the offer. We affirm the Administrative Law Judge's finding that the offer was insufficient to terminate Respondent's backpay obligation. Further, we agree with him that Respondent's reliance on the advice of the Regional Compliance Officer was misplaced. See *Capitol Temptrol Corporation*, 243 NLRB 575, 589, fn. 59 (1979).

[2] *Southern Household Products Company, Inc.*, 203 NLRB 881 (1973); *Fibreboard Paper Products Corporation*, 180 NLRB 142, 147–148 (1969), enfd. 436 F.2d 908 (D.C. Cir. 1970).

applications in the absence of a current vacancy.[3] The service manager of Frank Nelson Motors testified that he requested applicants to fill out an application regardless of whether a vacancy existed. Nonetheless, no conflict is presented by his testimony or that of Jones. As noted above, Jones testified that he may have spoken to a mechanic rather than the service manager. But even if the testimony of the three service managers raises some doubts as to Jones' efforts to gain employment at these three dealerships, no such doubts are sufficient to warrant resolving the issue of the adequacy of the job search against the discriminatee. Such doubt must be resolved against the wrongdoer responsible for the existence of uncertainty.[4] Respondent's evidence hardly refutes Jones' claim that he sought employment with any of the other employers named by him.

Respondent presented no probative evidence that there were jobs available in the area for a mechanic of Jones' skills and qualifications,[5] or that Jones rejected suitable employment. While a service station owner offered Jones employment on a percentage basis, we find, in agreement with the Administrative Law Judge, that Jones did not incur a willful loss of employment by failing to accept this position since there was no guarantee that he would be given work on which to earn a commission. Contrary to Respondent, the fact that Jones sought and obtained work as a musician after failing to find work as a mechanic[6] does not constitute an unreasonable removal of himself from the appropriate job market. As Respondent failed to show that Jones neglected to make a good-faith search for employment after his discharge, we shall award backpay to Jones from July 17, 1978, to September 9, 1978. Accordingly, we find that he is entitled to $11,025.85[7] rather than $7,461.85[8] as found by the Administrative Law Judge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Neely's Car Clinic, Vallejo, California, its officers, agents, successors, and assigns, shall pay to Richard Jones backpay in the amount set forth above, together with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

[3] While Avery Greene Motors hired a mechanic in August 1978, there was no showing that a vacancy existed at the time Jones contacted that employer. Backpay reports submitted by Jones to the Board's Regional Office indicate that he applied for work at Avery Greene Motors on July 24, 1978. The service manager testified that a mechanic was hired by his predecessor on August 22, 1978. There was no showing that a mechanic of Jones' experience or qualifications would have been hired, and the record shows that the mechanic hired, unlike Jones, had foreign car experience.

[4] *NHE/Freeway, Inc., et al.*, 218 NLRB 259, 260 (1975), enfd. 545 F.2d 592 (7th Cir. 1976); *Southern Household Products Company, Inc., supra.*

[5] One mechanic was hired by Frank Nelson Motors in November 1978 and one by Fairfield Toyota on August 8, 1978. There was no testimony concerning the requirements for either position.

[6] *Midwest Hanger Co., and Liberty Engineering Corp.*, 221 NLRB 911, 923 (1975), enfd. in pertinent part 550 F.2d 1101 (8th Cir. 1977); *United Aircraft Corporation*, 204 NLRB 1068 (1973). Indeed, it is incumbent on a claimant to seek work for which he possesses extensive skills. *Knickerbocker Plastic Co., Inc.*, 132 NLRB 1209, 1219 (1961).

[7] In so doing we do not grant Jones' claim for automobile mileage expenses incurred in his search for employment in the third quarter of 1978. Jones did not testify as to any distances he drove incident to his job search and arrived at an estimate by dividing his monthly mileage in half. While the Board has accepted claims based on estimates, the estimates must have a foundation in fact. *W. C. Nabors Company*, 134 NLRB 1078, 1092 (1961). As there is no basis for attributing the mileage claimed to Jones' search for work, this expense has not been proven with sufficient particularity. Accordingly, we deny the claim. *Charles T. Reynolds, Sr., d/b/a Charles T. Reynolds Box Company*, 155 NLRB 384, 387 (1965), enfd. 399 F.2d 668 (6th Cir. 1968).

[8] In sec. 5 of his Supplemental Decision, the Administrative Law Judge inadvertently lists Jones' second quarter 1978 interim earnings as $7,720. In accordance with the backpay specification, undisputed in pertinent part by Respondent, we shall correct this figure to read $1,720.

[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: On May 17, 1979, the National Labor Relations Board issued a Decision and Order in the above-captioned case (242 NLRB 335) finding that Neely's Car Clinic, herein called Respondent, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. The Board's Order required Respondent, *inter alia*, to reinstate employee Richard Jones "to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges," and to make him "whole for any loss of pay he may have suffered by reason of the discrimination against him."

A dispute having arisen over the amount of backpay due Jones under the Board's Order, on February 11, 1980, the parties entered into a stipulation providing, *inter alia*, that Respondent waive its right to seek review of the Board's Order and that the amount of backpay due to Jones be determined by a hearing. On May 28, 1980, the Acting Regional Director for Region 20 of the Board issued a backpay specification alleging the amount of backpay due Jones under the Board's Order. Respondent filed a timely answer, which was further amended at the hearing. The matter was heard by me in Vallejo, California, on August 26 and September 18, 1980.

The principal questions presented for decision are:

(1) Whether Respondent's backpay liability toward Jones terminated in October 1978 when it offered Jones reinstatement to his former job.

(2) Whether Respondent's backpay liability toward Jones terminated in November 1978 or March 1979 when the Compliance Officer for Region 20 notified Respondent that its October 1978 offer of reinstatement was valid.

(3) Whether Respondent's backpay liability toward Jones terminated in February 1979 when it alleges that Jones would have otherwise been laid off had he not been discriminatorily discharged.

(4) Whether Jones should be denied backpay because he allegedly failed to mitigate damages.

After resolution of these principal issues, there remains the computation of backpay and the resolution of some subsidiary issues necessary thereto.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS AND CONCLUSIONS

I. THE OFFER OF REINSTATEMENT

Respondent contends that the backpay period should be terminated on October 4, 1978, when its attorney, Mark Jordan, sent the following letter to discriminatee Jones:

> Dear Mr. Jones:
>
> We are the representative of the firm named above [Neely's Car Clinic] and have been authorized by Mr. Jim Neely to offer you immediate and unconditional reinstatement to your former position without reduction in your hourly rate of pay or any other term or condition of employment.
>
> You are expected to timely report for work on or before five (5) business days from receipt of this letter. Should you decline to accept this offer of reinstatement, please inform Mr. Jim Neely promptly. His telephone number is (707) 644-5566.
>
> Should you fail to respond, it must be presumed you are not interested in working at Neely's Car Clinic.
>
> Sincerely,
> /s/ Mark D. Jordan
> Attorney

Jones testified that he received the letter from Jordan on October 6. According to Jones, he went to the Board's Regional Office and met with Robert Buffin, the Board attorney who was handling the underlying unfair labor practice case. During this meeting, Jones showed Buffin the reinstatement offer and said that he needed more time to report to work because he had promised to give his present employer 2 weeks' notice before leaving. Jones requested that Buffin contact Jordan and determine whether Respondent would agree to give Jones more time. According to Jones, Buffin, in Jones' presence, called Jordan at his office and reported back that Jordan would have to talk with Jim Neely, one of Respondent's owners, to ascertain whether Neely would agree to give Jones more time to accept the offer. Both Buffin and Jordan deny such a conversation took place. In fact, Jordan was in court and not in his office on the date of the alleged conversation. Thus, I do not credit Jones' version of these events.

According to the testimony of Jordan, on October 23[1] Buffin called and informed him of his intent to amend the complaint at the unfair labor practice hearing. Buffin then told Jordan that the Regional Office had taken the position that Respondent's reinstatement offer was invalid because it did not give Jones sufficient time to quit his interim employment in order to report for work with Respondent. Buffin stated that discriminatees were entitled to a 2-week period of time in order to put their affairs in order. Buffin advised Jordan that Jones would report for work on October 30, 1978.[2] Jordan, upset with the timing of Buffin's amendment to the complaint, said nothing with respect to the offer of reinstatement.

Based on his understanding of the conversation, Buffin did not tell Jones to return to work for Respondent. Based on his understanding of the conversation, Jordan instructed Neely that he had to hold Jones' job open until October 30. Neely reluctantly agreed to hold a position open for Jones. However, Jones did not report to work for Respondent on October 30. Thereafter, on November 7, Jordan mentioned to Buffin that Respondent had expected Jones to report for work on October 30. Buffin replied that Jordan had never notified him to tell Jones to report for work and, therefore, Buffin had not told Jones to do so. Buffin suggested that Jordan come to his office to clear up the matter but Jordan refused to do so.

At the time of the disputed reinstatement offer, Jones was working as a musician at a nightclub in Vallejo. Jones began working at the club in September 1978. According to Jones, he agreed as a condition of employment that, if he intended to quit that job, he would give the club at least 2 weeks' notice. Jones testified that he signed an agreement to that effect.

As discussed above, Respondent contends that its backpay liability was terminated by its letter of October 4, 1978. The General Counsel, on the other hand, contends that the offer was invalid because it did not allow Jones a reasonable amount of time to report for work.

It is established Board law that a discriminatee, upon receiving an offer of reinstatement, has a fundamental right to a reasonable time to consider whether to return. *Browning Industries, Venetian Marble of Kentucky*, 221 NLRB 949, 952 (1975); *Penco Enterprises, Inc., et al.*, 216 NLRB 734 (1975). What constitutes a reasonable period of time depends on the circumstances of the particular case. Clearly, a discriminatee should be given enough time to give his interim employer reasonable notice. *Seminole Asphalt Refining, Inc.*, 225 NRLB 1202, 1203 (1976), citing *Thermoid Company*, 90 NLRB 614, 616 (1950). Under these circumstances, I find that Respondent's offer did not provide Jones with sufficient time to

[1] Buffin placed this conversation on October 6. That date appears likely based upon the October 30 reporting date.

[2] According to Buffin, he said that Jones was willing to report to work on October 30.

give his new employer reasonable notice. Accordingly, I find that the October 4 letter did not of itself terminate Respondent's backpay liability.

The issue remaining to be resolved is whether Respondent's backpay liability was terminated by its extension of Jones' reporting date to October 30, 1978. For the following reasons I find that Respondent's liability was not terminated. In *Harrah's Club*, 158 NLRB 758, 759 (1966), the Board held that a discriminatee is not required to respond to an invalid offer of reinstatement which does not offer him sufficient time to report to work. To hold otherwise would place an undue and unwarranted burden upon the discriminatee to make a counterproposal to such an offer. Here, Jones did more than he was required to do. He communicated to Respondent, through the Board agent, the deficiency in its reinstatement offer. The burden was on respondent to communicate any modification of its offer or any new offer to the discriminatee. As it was Respondent's burden to communicate its intention to hold a position open for Jones until October 30, it cannot rely on the failure of communication between Jordan and Buffin to terminate its liability. Even assuming, *arguendo*, that Buffin was acting on behalf of Jones, Jordan made no unequivocal offer to Buffin upon which Jones could rely to quit his employment. Neely's reluctant concession to Jordan, that he would hold a position for Jones until October 30, was never communicated to either Buffin on Jones. Accordingly, I find that Respondent's backpay liability toward Jones was not terminated by its reinstatement offer of October 4, 1978.

II. THE STATEMENTS OF THE COMPLIANCE OFFICER

Respondent argues that its backpay liability should be terminated as of November 25, 1978, or, in the alternative, as of March 19, 1979, based on statements of the compliance officer for Region 20 that Respondent's reinstatement offer of October 4, 1978, was valid. In support of this contention, David Comb, a labor consultant representing Respondent, testified that beginning on November 7, 1978, he had several conversations with Shirley Bingham, the Regional Compliance Officer, concerning the validity of Jordan's October 4 letter to Jones. Comb was advised by Bingham on November 25, 26, or 27, 1978, that he had "nothing to worry about" and that the liability had been effectively tolled. Comb further testified that, based on that advice, he determined that an unconditional offer of reinstatement was not necessary to terminate Respondent's backpay liability toward Jones. However, on November 28, 1978, Bingham wrote Comb stating that, if Jones' version of the events surrounding the reinstatement offer was true, "[Y]our client's reinstatement offer cannot be deemed to be valid."

On February 28, 1979, Administrative Law Judge Earldean V. S. Robbins issued her Decision in the underlying unfair labor practice case finding, *inter alia*, that Respondent had discharged Jones in violation of Section 8(a)(4) and (1) of the Act. On March 8, 1979, Jordan, on behalf of Respondent, notified the Board's Executive Secretary of its intention to file exceptions to the Decision of the Administrative Law Judge. Subsequently, on March 26, 1979, Jordan notified the Executive Secretary that Respondent would not file exceptions to the Decision. Comb testified that the decision not to file exceptions was based upon a letter from Bingham dated March 19, 1979, stating that the October 4 offer to Jones was "acceptable on its face." However, on May 11, 1979, Bingham wrote Comb stating, *inter alia*, that it was the "Region's position that Mr. Jones has not received a valid reinstatement offer." On October 30, 1979, Bingham again wrote to Comb indicating that it was her position that Respondent's backpay liability to Jones terminated on October 4, 1979. However, in this letter Bingham stated, "[m]y position regarding Mr. Jones' backpay period is mine, alone, and has not been discussed with the Regional Director." Apparently, on November 6, 1979, the Regional Director overruled Bingham and on November 15, 1979, Jordan sought leave to file exceptions to the Decision of the Administrative Law Judge. On November 20, 1979, the Board's Associate Executive Secretary notified Jordan that the time for filing exceptions had long since passed and, therefore, Respondent's request had to be denied.

Based upon the uncontradicted facts above, Respondent argues that it relied to its detriment on the representations of the Compliance Officer and, therefore, that its backpay liability should be tolled. I reject that argument for the following reasons. First, 3 days after orally telling Comb that Respondent's offer was valid, Bingham notified Respondent, by letter, that "your client's reinstatement offer cannot be deemed to be valid." Thereafter, Respondent did not make another reinstatement offer to Jones. Such conduct cannot be attributed to the Compliance Officer. Secondly, Comb and Jordan knew, or should have known, that Bingham was acting under the auspices of the Regional Director and that Bingham's opinions were reviewable by the Regional Director. The Regional Director's actions in compliance matters are reviewable by the Board. See *Ace Beverage Company*, 250 NLRB 646 (1980). Thus, under *Ace Beverage*, the Compliance Officer's opinion as to the subject offer of reinstatement, even if adopted by the Regional Director, was not binding upon the Charging Party, who could seek review by the Board. Finally, it would be inequitable to punish Jones for the shortcomings of a Board agent. *McCann Steel Company, Inc.* v. *N.L.R.B.*, 570 F.2d 652, 654 (6th Cir. 1978). The consequences of any error by the Board's Regional Office in processing a backpay claim should not be placed upon the wronged employee to the benefit of the wrongdoing employer. *N.L.R.B.* v. *J. H. Rutter-Rex Manufacturing Co., Inc.*, 396 U.S. 258, 265 (1969), rehearing denied 397 U.S. 929 (1970).

III. THE LAYOFF OF FEBRUARY 1979

Respondent contends that the backpay period for Jones should be terminated as of February 7, 1979, the date on which it alleges Jones would have otherwise been laid off had he not been unlawfully discharged.

Respondent is engaged in the retail and wholesale repair and service of automobiles. For a number of years prior to January 1979, Respondent had a contract with the United States Navy for the servicing of automobiles and trucks. The last contract between Respondent and

the Navy expired on December 31, 1978. However, there was sufficient work remaining from the contract to keep Respondent's work force busy during the month of January 1979. As a result of the loss of the Navy contract, Respondent experienced a substantial drop in its income and a substantial reduction in the number of hours of work for its employees. Thus, a layoff of one employee was necessitated. On February 7, 1979, journeyman mechanic Kenneth Sidie was laid off.[3] Sidie was recalled on March 12 but was subsequently laid off on March 19.

Prior to Jones' discharge, he was working primarily on Navy vehicles. Apparently, based on this fact, Respondent argues that Jones would have been discharged rather than Sidie. However, no specific testimony was offered on this point.

At the time of Jones' discharge, two other mechanics also worked primarily on Navy vehicles. After the discharge of Jones, Sidie, who had been hired prior to Jones' termination, was assigned to work primarily on Navy vehicles. As of the February layoff, Respondent employed six journeymen mechanics and one apprentice. Had Jones remained in Respondent's employ, he would have been the senior journeyman mechanic. Sidie, on the other hand, ranked fourth among the journeymen mechanics in terms of seniority. In selecting Sidie for layoff, Respondent compared him to the two mechanics junior to Sidie.

Carl Van Valkinburg, junior to Sidie, was retained on the basis that he was Respondent's sole transmission specialist and concededly highly qualified. Thus, Respondent was forced to choose between Sidie and mechanic Randolph Gelpi. Gelpi was selected for retention because he was a front-end specialist and Respondent's only mechanic with a license issued by the State of California in lamp and brake repair. Thus, with no comparison to the employees more senior to Sidie, Respondent selected Sidie for layoff on the basis of the relative abilities between Sidie, Van Valkinburg, and Gelpi in light of the type of work that continued to be available to Respondent.[4]

If Respondent had continued Jones in its employ, there is no evidence from which to conclude it would have laid him off instead of Sidie. Jones had more seniority than Sidie.[5] There is no evidence regarding the relative abilities of Jones and Sidie. James Neely's testimony that Jones was not as qualified as Van Valkinburg, the automatic transmission specialist, is credited. However, Neely's testimony regarding the relative abilities of Jones and three other mechanics who were retained (Henry, Flores, and Gelpi) was vague and unconvincing. No testimony regarding the relative ability of Steve Anderson, another mechanic who was retained, was offered.

Respondent had the burden of proving that Jones would have been laid off in February 1979 had he still been in its employ. See, e.g., *J. L. Holtzendorff Detective Agency, Inc.*, 206 NLRB 483, 484 (1973). *Mastro Plastics Corporation and French-American Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1346 (1962), enfd. 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). As discussed above, I find that Respondent has failed to meet its burden of proof.

IV. JONES' DUTY TO MITIGATE DAMAGES

As indicated above, Respondent, contrary to the General Counsel, asserts that Jones' backpay should be reduced because he did not make a good-faith effort to seek employment and thereby incurred a willful loss of earnings.

The following legal principles were recently reaffirmed by the Board in *Highview, Incorporated*, 250 NLRB 549, 550–551 (1980), citing *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646 (1976):

> An employer may mitigate his backpay by showing that a discriminatee "wilfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment" (*Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 199–200 (1941), but this is an affirmative defense and the burden is upon the employer to prove the necessary facts. *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (5th Cir. 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or a low interim earning; rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable assertion in this regard, not the highest standards of diligence." *N.L.R.B.* v. *Arduini Mfg. Co.*, 394 F.2d 420, 422–423 (1st Cir. 1968). Success is not the measure of the sufficiency of the discriminatees' search for interim employment; the law "only requires an honest good-faith effort." *N.L.R.B.* v. *Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). And in determining the reasonableness of this effort, the employee's skills and qualifications, his age, and the labor conditions in the area are factors to be considered. *Mastro Plastics Corp.*, 136 NLRB 1342, 1359.

In determining whether an individual claimant has made a reasonable search for employment, the test is whether the record as a whole establishes the employee had diligently sought other employment

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[3] Sidie's layoff was the subject of the proceedings in *Neely's Car Clinic*, 249 NLRB 471 (1980), in which the Board affirmed the findings of Administrative Law Judge James T. Rasbury that the layoff of Sidie was not unlawfully motivated in violation of Sec. 8(a)(3) of the Act.

[4] *Id.* at 473–474.

[5] The collective-bargaining agreement between Respondent and the Union which expired on May 31, 1978, provided, *inter alia*, that, "when a reduction in the work force is necessary due to a lack of work, and when qualifications and abilities of employees are equal, the principle of seniority shall be followed." Although the contract had expired at the time of the layoff, there is no evidence that Respondent has ever modified the seniority provisions contained therein. Further, there is a sound basis in the business practice of considering seniority in the selection of employees for layoff or retention. *Pacific Southwest Airlines*, 201 NLRB 647, 655–656 (1973); *Jack G. Buncher d/b/a The Buncher Company*, 164 NLRB 340, 342 (1967).

during the entire backpay period. *Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales, Inc.*, 195 NLRB 395, 398 (1972).

It is also well established that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5th Cir. 1966); *Southern Household Products Company, Inc.*, 203 NLRB 881 (1973).

Jones testified that shortly after his discharge he visited several automobile dealers on the recommendation of Union Business Agent Bud Willis.[6] However, Jones was unsuccessful in finding any dealers with job openings. Jones further testified that he visited the state unemployment office about obtaining work as a mechanic but was told that the Union would be a better source of job information. Jones continued to visit the Union's office two or three times a week from July 17, 1978, the date of his discharge, until September 1978, when he accepted employment as a musician.

Jones testified that he made personal visits to automotive repair facilities within a 30-mile radius of his home. Based upon an estimate that one-half of the driving mileage was due to his search for work, Jones claimed that he drove between 600 and 700 miles in July and 900 and 1,000 miles in August 1978 looking for work. Jones could not recall any specifics as to his search for work and was a very evasive witness.

During the backpay period Jones submitted reports to the Regional Office's compliance section which showed, *inter alia*, his attempts to find work. Jones' report for the month of July 1978 showed, *inter alia*, that he visited four car dealers and one service station on July 24, 1978. The report filed for the month of August 1978 showed, *inter alia*, that Jones visited five potential employers during August 2-5, 1978. When questioned about the specifics of these visits, Jones stated that he did not remember. However, Jones testified that it was his practice to seek out the service manager and inquire as to whether there were job openings. Jones further testified that the dealers were not hiring and, therefore, not accepting job applications.

Respondent presented evidence from the service managers of three automobile dealerships listed by Jones in his backpay reports. The credited testimony of these three disinterested witnesses establishes that they were taking job applications from all applicants during the time period of Jones' alleged visits to their businesses. Further, two of these businesses hired mechanics during the same time period and the third hired an apprentice mechanic in November 1978. While there is no reason to infer that Jones would have been hired if he had applied, it cannot be doubted that Jones did not seek work at these businesses. Based on Jones' demeanor on the stand, his impeachment by disinterested witnesses, and the lack of corroboration for his testimony, I do not credit any of Jones' self-serving testimony regarding his search for work.[7]

The only credible evidence of a search for work is the testimony of Dale Gibb, owner of Gibb's Union 76 Service Station in Vallejo. Gibb testified that Jones visited his station, seeking employment. Gibb told Jones that he had insufficient work for another mechanic but offered Jones the opportunity to work on a commission basis. Jones would work on an "as needed" basis and would receive a percentage of the labor costs on the jobs which he performed for Gibb. However, Gibb could not guarantee Jones that there would be any work under this arrangement. Jones did not accept Gibb's offer.

I find that Jones was not required to accept such an offer, which would have required a commitment of his time without knowing whether he would receive compensation. However, I cannot find that this incident alone supports the contention that Jones made a diligent search for work. Viewing the record as a whole, I cannot find that Jones had diligently sought other employment during the entire backpay period. Accordingly, I would therefore toll backpay during the period from the date of Jones' discharge until he commenced working in September 1978.[8]

V. COMPUTATION OF BACKPAY

Jones' gross backpay has been calculated based on his hourly wage of $9.90 per hour for a 40-hour week.[9] I have offset from interim earnings payments made by Jones for union dues required as a condition of his interim employment. [Computations for backpay omitted from publication.]

Total Backpay Principal	$7,461.85

[Recommended Order omitted from publication.]

[6] Willis was called as a witness by the General Counsel but did not testify as to this issue.

[7] As the United States Court of Appeals for the Sixth Circuit stated in *DeLorean Cadillac, Inc.* v. *N.L.R.B.*, 619 F.2d 554, 555 (6th Cir. 1980): "[T]he uncorroborated testimony of a party who stands to benefit from an award of reinstatement or backpay should be subject to strict scrutiny."

[8] Respondent contends that Jones should be completely disqualified from backpay because of his lack of credibility. I do not believe such a penalty is justified. Cf. *Flite Chief, Inc., et al.*, 246 NLRB 407 (1979) (where the Board did not penalize a discriminatee by disallowing backpay even though he had concealed interim earnings from the Board's Regional Office). The proper remedy for the failure to seek work is to assume that any other employment would have yielded earnings equal to what Jones would have earned working for Respondent. See, e.g., *Brotherhood of Painters, Decorators & Paperhangers of America, Carpet, Linoleum and Resilient Tile Layers Local Union No. 419, AFL, et al. (Spoon Tile Company)*, 117 NLRB 1596, 1598, fn. 7 (1957); *Southeastern Envelope Co., Inc. & Southeastern Expandvelope, Inc. (Diversified Assembly, Inc.)*, 246 NLRB 423 (1979).

[9] As discussed above, backpay has been tolled until Jones commenced working in September 1978.